

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:08-CR-252-01-F
No. 5:11-CV-383-F

CHARLES NEWBY,)
Petitioner,)
)
v.) O R D E R
)
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the court for ruling on the Government's Motion to Dismiss [DE-53] petitioner Charles Newby's ("Newby") Motion to Vacate under § 2255 [DE-50]. The Government has mis-construed the record.

Newby's March 7, 2011, motion for Retroactive Application of Sentencing Guidelines to Crack Cocaine Offense [DE-43] was not a § 2255 motion. It was denied by order of March 11, 2011 [DE-44], in which the court observed that Newby "was sentenced under the provisions of the retroactive crack cocaine amendment. At that time, the court fully considered the applicability of the amendment to the defendant's case and where the court found the defendant eligible and a reduction appropriate, the retroactive provision was applied. Therefore, no further consideration is warranted."

On May 12, 2011, Newby filed a "Motion to Reduce Sentence" [DE-47], which sought relief that the court determined should have been requested pursuant to 28 U.S.C. § 2255. By order of May 16, 2011 [DE-49] the undersigned entered in order pursuant to *United States v. Castro*, 540 U.S. 375 (2008), directing Newby either to "withdraw your May 12, 2011, motion, or amend it so that it contains all the § 2255 claims you believe you have."

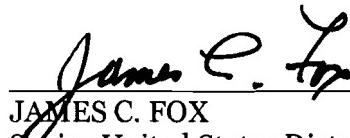
Newby complied with the May 16th order by filing an amended § 2255 motion [DE-50] on July 20, 2011, which was drawn on the correct form and filed within the time allowed by that order. Newby's Motion to Reduce Sentence [DE-47], therefore, is DENIED as moot. The court reviewed Newby's amended § 2255 motion and directed the United States to respond to it. The Government's Response, [DE-53] was a Motion to Dismiss.

Newby's § 2255 motion [DE-50] relates back to the May 12, 2011 [DE-47], motion it amended in compliance with the court's order. It is a first § 2255 petition, and it was timely filed in May 2011.

Accordingly, the Government's Motion to Dismiss [DE-53] is DENIED. The Clerk of Court is DIRECTED to continue management of this action according to the rules and procedures of this district.

SO ORDERED.

This, the 19 day of October, 2011.



JAMES C. FOX
Senior United States District Judge